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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1398

ALOE CREME LABORATORIES, INC.,
Petitioner,

vs.

MILSAN, INC. et al.,
Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Respondents contend the only question presented for review is:

DID THE PETITIONER PRESENT EVIDENCE SUFFICIENT TO PROVE SECONDARY MEANING?

STATEMENT OF THE CASE

Respondent manufactures and sells beauty aids labeled Sandra Lee's Aloe Magic Skin Soap, Sandra Lee's Oil of Aloe Moisturizer, Sandra Lee's Lotions of Aloe, Sandra Lee's Aloes of Aloe, Sandra Lee's Aloesette and Sandra Lee's Powders of Aloe. It claims no trademark rights (R.

252) and contends only that the labeling of its products is descriptive of the contents (R. 234, 235).

The parties' competing products are packaged distinctively from each other (petitioner's products were introduced as their exhibits 34 through 50 and respondents' products introduced as defendants' exhibits 1 through 8) and petitioner's products are in a higher price range (petitioner's exhibits 8 and 53). There was no testimony about customer confusion between the competing products. Petitioner has no patent on its manufacturing process (R. 58).

Petitioner presented testimony of ten retail salesmen in an effort to prove secondary meaning of alo. All witnesses but one sold only petitioner's products (R. 465). Of the eight witnesses cross-examined, five were employed directly by petitioner (R. 88, 111, 148, 129, 139, 140) and another was the wife of petitioner's treasurer (R. 226). The lone salesman who sold the competing products testified that consumers seeking aloe products can be interested in either company's product (R. 200). This testimony was recognized by the trial court (R. 465) and the appellate court (Pet. App. 11) as refuting any contention that the evidence established secondary meaning.

ARGUMENT

I

This Court Should Not Be Burdened with Reviewing Disputed Facts.

This Court's function to review the trial court's finding of fact approved by the court of appeals is set forth in *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U.S. 271, 275.

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot un-

dertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

The substantial evidentiary burden, necessary to prove secondary meaning to a generic term, was not met sub judice by the paucity of petitioner's attempted proof.

II.

There Is No Conflict.

The ruling below is only the application of Civil Rule 52(a), that findings of fact shall not be set aside unless clearly erroneous. The merit or lack of merit in petitioner's defeat in the Seventh Circuit on another legal theory has no relevancy whether certiorari should be granted here.

The question under consideration on the new *Nu-Enamel* case (305 U.S. 315) was "whether registration of 'Nu-Enamel' is permissible or impermissible under the act" (305 U.S. at 326). Secondary meaning in that case was admitted (305 U.S. at 320, 322 and 326) and the Court merely held that registration was permissible so as to confer jurisdiction in the federal courts. This case incidentally was decided the same term as *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, holding (at 116) "The plaintiff has no exclusive right to the use of the term 'Shredded Wheat' as a trade name. For that is the generic term of the article, which describes it with a fair degree of accuracy;". While the petitioner is not selling aloe, all their advertising (petitioner's exhibits 51, 73, 76, and 80) stresses aloe is the distinctive and effective ingredient in its products.

Secondary meaning was proven also in the *Coca-Cola* case (254 U.S. 143) and the only issue then before the Court was whether unclean hands would preclude an injunction.

CONCLUSION

The decision below is clearly correct. For this and the foregoing argument, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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